Thien Teck Soon v Public Prosecutor

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COURT OF APPEAL (KUCHING) — CRIMINAL APPEAL NO Q-05–85 OF 2007
SULAIMAN DAUD, JEFFREY TAN AND ZAHARAH IBRAHIM JJCA
1 DECEMBER 2010

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Criminal Law — Dangerous drugs — Possession — Drugs found in ceiling and under mattress — Whether possession proved

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Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction — Whether trial judge erred in holding government chemist to be qualified to analyse drugs seized — Whether findings of government chemist that were not challenged during trial could be disputed on appeal — Whether there was break in chain of custody of drugs seized — Whether trial court erred in holding that appellant had exclusive possession and knowledge of drugs — Whether prosecution failed to comply with s 179(1) of the Criminal Procedure Code

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Acting on information, the narcotics division at Limbang conceived a sting operation to lure the appellant to sell drugs to an agent provocateur, who introduced himself as a drug dealer and indicated his intention to purchase drugs. The appellant agreed to sell the equivalent of 150g of methamphetamine (a dangerous drug) to the agent provocateur at the price of RM22,000. Assistant Superintendent of Police Peter Ambuas ('the ASP') secured the RM22,000 ('the trap money') and had it handed to the agent provocateur. On 30 April 2003 at about 5.30pm the appellant arrived in Room 108 of the Royal Park Hotel and handed to the agent provocateur a red bag that contained three packets of a crystalline substance that was later analysed by a government chemist to be 95.77g of methamphetamine in exchange for the trap money. The agent provocateur placed the red bag containing the drugs inside a drawer. While the appellant was counting the trap money he had received from the agent provocateur, the ASP burst into room 108 and identified himself. The appellant was restrained, arrested and read a caution and the trap money was recovered from him. When the ASP asked the appellant where he kept the rest of the drugs, he had allegedly replied that the rest of the drugs were in Room 504 of the Purnama Hotel. In room 504, which was solely occupied by the appellant and opened with the assistance of the hotel staff, the police recovered drugs from the ceiling in the bathroom and from under the mattress. The appellant was charged with trafficking in 95.77g of methamphetamine ('the first charge'), and possession of 32.57g of methamphetamine ('the second charge') and 0.26g of cannabis ('the third charge'). At the close of the prosecution case the trial judge found that a prima

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facie case had been made in respect of all the three charges and ordered the appellant to enter his defence. The appellant, who elected to give evidence from the dock, claimed that he together with another had passed off another chemical called 'Tawas' as drugs to the agent provocateur. In short it was the appellant's defence that he had not sold any dangerous drugs to the agent provocateur. As for the possession charges, the appellant denied any knowledge of the presence of those drugs found under the mattress of room 504. At the end of the case, the trial judge held that there was no doubt as to the appellant's guilt and found him guilty of all the three charges. This was the appellant's appeal against conviction and sentence. The appellant submitted that the trial judge had erred in holding the government chemist to be qualified to analyse the drugs in the instant case, in that, there was a doubt as to the correctness of the chemical analysis and the conclusion that the substances were in fact the dangerous drugs as stated; that there was a break in the chain of custody when the drugs seized were not sealed on the spot; that the trial court erred in holding that the appellant had exclusive possession and knowledge of the nature of the drugs; and that the opening address of the prosecution had failed to comply with s 179(1) of the criminal Prosedure Code as it had not indicated that the evidence of an agent provocateur would be adduced.

Held, dismissing the appeal:

(1) Based on the evidence adduced no issue could be raised that the drug exhibits were not properly marked. The ASP had marked the three packets of methamphetamine recovered from room 108 and put them back into the red bag, which he then deposited into his sling bag, before proceeding to room 504. Thereafter the ASP had marked and wrapped the drugs recovered from the ceiling of the bathroom in room 504 with a shower cap and also marked the drugs recovered from under the mattress in the same room. Since the identity of the drugs recovered from room 108 and room 504 was never challenged, it was not in dispute and the chain of custody was of no importance. It was too late at this stage of the appeal, to dispute the identity of the exhibits (see para 15).

(2) Since the findings of the government chemist were not challenged during the trial, they could not be disputed on appeal. In any case, there were reasons for the findings by the government chemist, although there was no necessity for him to support his findings with the details of his analysis (see paras 16–17).

(3) There was no requirement that the opening statement by the prosecution should contain elaborate details. The omission of the mention of any part of the prosecution evidence in its opening statement was not destructive to the prosecution case. Nor was the prosecution prevented later from adducing evidence not earlier mentioned in its opening statement (see para 18).

(4) In relation to the trafficking charge, the weight of the dangerous drugs involved was not a determinative factor. The unchallenged evidence of the agent provocateur that the appellant sold that quantity of methamphetamine found in room 108 to him, which was allowed for admission by s 40A of the Dangerous Drugs Act 1952 ('the Act'), was direct evidence of the act of trafficking by the appellant and the recovery of the drugs from the drawer in room 108 substantiated the fact of the act. Thus, the act of trafficking was unmistakably made out by direct evidence (see para 19).

(5) In relation to the two charges of possession, the evidence was that part of the drugs stated in those charges was discovered above the ceiling of the bathroom of room 504 in consequence of the information received from the appellant. This fact together with the further evidence that he was the sole occupier of room 504 meant that the appellant would have known that the drugs were so concealed. There was no direct evidence but on the facts, it should be that only the appellant could have concealed those drugs. In order to conceal those drugs the appellant had to have custody or control of it and with custody or control, s 37(d) of the Act presumed that the appellant had possession of those drugs. All the ingredients for the offence of possession were present and proved (see para 20).

(6) The appellant's defence that he sold 'Tawas' to the agent provocateur could not stand. The fact of the matter was that it was methamphetamine that was recovered in room 108 in the presence of the appellant (see para 21).

[Bahasa Malaysia summary

Bertindak atas maklumat, bahagian narkotik di Limbang telah merancang satu operasi sengit untuk menarik perhatian perayu menjual dadah kepada ejen perangkap, yang memperkenalkan dirinya sebagai penjual dadah dan menyatakan niatnya untuk membeli dadah. Perayu bersetuju untuk menjual methamphetamine seberat 150g ('dadah berbahaya') kepada ejen perangkap itu dengan harga RM22,000. Penolong Superintendan Polis Peter Ambuas ('ASP') telah memperoleh RM22,000 itu ('duit perangkap) dan menyerahnya kepada ejen perangkap. Pada 30 April 2003 lebih kurang pukul 5.30 petang perayu tiba di bilik 108 Hotel Royal Park dan menyerahkan kepada ejen perangkap beg merah yang mengandungi tiga bungkusan bahan berhablur yang kemudian telah dianalisis oleh ahli kimia kerajaan sebagai methamphetamine seberat 95.77g untuk pertukaran dengan wang perangkap itu. Ejen perangkap telah meletakkan beg merah yang mengandungi dadah itu dalam laci. Semasa perayu sedang mengira wang perangkap itu yang diterimanya daripada ejen perangkap, ASP itu memecah masuk ke dalam bilik 108 dan memperkenalkan dirinya. Perayu telah ditahan, ditangkap dan dibaca amaran dan wang perangkap itu diambil daripadanya. Apabila ASP bertanya kepada perayu di mana dia menyimpan dadah selainnya dia dikatakan telah

menjawab yang dadah yang lain itu di bilik 504 Hotel Purnama. Di bilik 504, yang dihuni oleh perayu seorang dan dibuka dengan bantuan pekerja hotel, polis menemui dadah daripada siling bilik air dan di bawah tilam. Perayu telah dituduh kerana mengedar 95.77g methamphetamine ('pertuduhan pertama'), dan memiliki 32.57g methamphetamine ('pertuduhan kedua') dan 0.2g kanabis ('pertuduhan ketiga'). Di penutup kes pendakwaan hakim perbicaraan mendapati bahawa satu kes prima facie telah dibuktikan berkaitan ketiga-tiga pertuduhan tersebut dan memerintahkan perayu memasukkan pembelaannya. Perayu, yang memilih untuk memberi keterangan dari kandang pesalah, mendakwa bahawa dia bersama seorang lain telah menyerahkan bahan kimia lain dikenali sebagai 'Tawas' sebagai dadah kepada ejen perangkap. Pendek kata adalah pembelaan perayu bahawa dia tidak menjual apa-apa dadah berbahaya kepada ejen perangkap. Berhubung pertuduhan milikan, perayu menafikan apa-apa pengetahuan tentang kewujudan dadah yang dijumpai di bawah tilam dalam bilik 504. Di akhir kes, hakim perbicaraan memutuskan bahawa kebersalahan perayu tidak diragui dan dia didapati bersalah terhadap ketiga-tiga pertuduhan itu. Ini adalah rayuan perayu terhadap sabitan dan hukuman. Perayu berhujah bahawa hakim perbicaraan terkhilaf dalam memutuskan ahli kimia kerajaan sebagai yang layak untuk menganalisa dadah tersebut dalam kes ini, di mana, terdapat keraguan tentang ketepatan analisis kimia dan kesimpulan bahawa bahan tersebut sememangnya dadah berbahaya sepertimana yang dikatakan; bahawa rangkaian penjagaan terputus apabila dadah itu dirampas tidak ditutup di situ; bahawa mahkamah perbicaraan terkhilaf dalam memutuskan bahawa perayu mempunyai milikan dan pengetahuan eksklusif tentang sifat dadah itu; dan bahawa pembuka bicara pendakwaan telah gagal mematuhi s 179(1) Kanun Prosedur Jenayah kerana ia tidak menunjukkan bahawa keterangan tentang ejen perangkap akan dikemukakan.

Diputuskan, menolak rayuan:

(1) Berdasarkan keterangan yang dikemukakan tidak ada isu boleh ditimbulkan bahawa ekshibit-ekshibit dadah tidak ditanda dengan betul. ASP telah menandakan tiga bungkusan methamphetamine yang dijumpai di bilik 108 dan meletakkannya ke dalam beg merah, yang kemudian telah dimasukkannya ke dalam beg sandang, sebelum menuju ke bilik 504. Berikutan itu ASP telah menandakan dan membalut dadah yang dijumpai dari siling bilik air di bilik 504 dengan topi mandi dan juga menandakan dadah yang dijumpai dari bawah tilam di bilik sama. Oleh kerana identiti dadah yang dijumpai dari bilik 108 dan bilik 504 tidak dicabar, ia tidak boleh dipertikaikan dan rangkaian penjagaan tidak penting. Adalah terlewat di peringkat rayuan ini untuk mempertikaikan identiti ekshibit-ekshibit itu (lihat perenggan 15).

(2) Oleh kerana penemuan ahli kimia kerajaan tidak dicabar semasa perbicaraan maka ia tidak boleh dipertikaikan semasa rayuan. Dalam apa

keadaan, terdapat alasan untuk penemuan ahli kimia kerajaan itu meskipun tidak perlu untuknya menyokong penemuannya dengan butiran analisisnya (lihat perenggan 16–17).

(3) Tiada keperluan untuk pembuka kata pendakwaan mempunyai butiran terperinci. Peninggalan untuk menyebut mana-mana bahagian keterangan pendakwaan dalam pembuka katanya tidak menjejaskan kes pendakwaan. Pendakwaan juga tidak dihalang untuk kemudiannya mengemukakan keterangan yang tidak dinyatakan pada awalnya dalam pembuka katanya (lihat perenggan 18).

(4) Berhubung pertuduhan pengedaran, berat dadah berbahaya terlibat bukan faktor penentu. Keterangan yang tidak dicabar tentang ejen perangkap bahawa perayu telah menjual kuantiti methamphetamine yang dijumpai di bilik 108 kepadanya, yang dibenarkan untuk diterima oleh s 40A Akta Dadah Berbahaya 1952 ('Akta'), adalah keterangan langsung tentang perbuatan pengedaran oleh perayu dan penemuan dadah dari laci di bilik 108 telah mengukuhkan fakta perbuatan itu. Oleh itu, perbuatan mengedar itu jelas dibuat melalui keterangan langsung (lihat perenggan 19).

(5) Berkaitan dua pertuduhan milikan, keterangan menunjukkan bahawa sebahagian daripada dadah yang dinyatakan dalam pertuduhan-pertuduhan itu dijumpai di atas siling bilik air bilik 504 berikutan maklumat yang diterima oleh perayu. Fakta ini bersama keterangan lain yang dia satu-satunya penghuni bilik 504 bermaksud bahawa perayu mempunyai pengetahuan tentang dadah yang disembunyikan itu. Tiada keterangan langsung tetapi berdasarkan fakta, adalah jelas bahawa hanya perayu yang mungkin telah menyembunyikan dadah tersebut. Bagi tujuan menyembunyikan dadah tersebut perayu mempunyai jagaan atau kawalannya dan dengan jagaan atau kawalan, s 37(d) Akta mengandaikan bahawa perayu memiliki dadah tersebut. Kesemua elemen untuk kesalahan milikan wujud dan telah dibuktikan (lihat perenggan 20).

(6) Pembelaan perayu bahawa dia telah menjual 'Tawas' kepada ejen perangkap tidak boleh kekal. Pada hakikatnya methamphetamine telah dijumpai di bilik 108 dalam kehadiran perayu (lihat perenggan 21).]

Notes

For a case on possession, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) para 181.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

A *Browne v Dunn* (1893) 6 R 67 (refd)
Chu Tak Fai v PP [2007] 1 MLJ 201, FC (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217, SC (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265, SC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97;
B [2003] 2 CLJ 19, CA (refd)
Leong Siew Hoong v PP [1988] 1 MLJ 396, HC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Mustakim bin Chek Man v PP [2010] 2 MLJ 760, CA (refd)
C *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997]
1 CLJ 233, FC (refd)
PP v Mohd Amin bin Mohd Razali & Ors [2002] 5 MLJ 406; [2002] 5 CLJ 281,
HC (refd)
PP v Sa'ari bin Jusoh [2007] 2 MLJ 409, FC (refd)
D *Timhar Jimdani Ong & Anor v PP* [2010] 1 MLJ 775, CA (refd)
Wai Chan Leong v PP [1989] 3 MLJ 356, SC (refd)
Wan Mohd Azman bin Hassan @ Wan Ali v PP [2010] 4 MLJ 141, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

E **Legislation referred to**
Criminal Procedure Code ss 113, 179, 179(1)
Dangerous Drugs Act 1952 s 2
Evidence Act 1950 ss 27, 37(d), (g), 40A, 114(g)

F *Voon Lee Shan (Voon & Co) for the appellant.*
Yaacub bin Chik (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Jeffrey Tan JCA (delivering judgment of the court):

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[1] The three charges against the appellant were (i) that he, on 3 May 2003, at about 5.40pm at Room 108, Royal Park Hotel, Jalan Buangsiol, Limbang, in the District of Limbang, in the State of Sarawak, trafficked in a dangerous drug
H (95.77g of methamphetamine) ('first charge'), and (ii) that he on 3 May 2003, at about 7.15pm at Room 504, Purnama Hotel, Jalan Buangsiol, Limbang, in the District of Limbang, in the State of Sarawak Royal Park Hotel, Jalan Buangsiol, Limbang, in the District of Limbang, in the State of Sarawak, had in his possession a dangerous drug (32.57g of methamphetamine) ('second
I charge'), and 0.26g of cannabis ('third charge').

[2] At the close of the prosecution case, the learned trial judge found that a prima facie case had been made for all three charges. The appellant was ordered to enter upon his defence. The appellant elected to give, and in the event gave

a statement from the dock. At the end of the entire case, the learned trial judge held that there was no doubt as to guilt. Against conviction and sentence for all three charges, the appellant appealed.

[3] The grounds of appeal and the oral/written submission of learned counsel challenged not the story of the prosecution, as found by the trial judge. We would summarise the story of the prosecution as follows. Acting on information, the narcotics division of the Royal Malaysian Police (police) at Limbang conceived a sting operation to lure the appellant to sell drugs to an agent provocateur (PW5 — Constable Stanley Tutum ak James Ragai). PW5 first telephoned the number, believed to that of the appellant, on 9 April 2003. PW5 introduced himself as a drug dealer and indicated his intention to purchase drugs. PW5 got no response. Later that day, PW5 received a telephone call from that number he had called. The caller informed PW5 that he had drugs for sale. PW5 indicated that he would want the sale to be transacted in Limbang. The next day (10 April 2003), PW5 telephoned the number that he called on 9 April 2003. The person who answered informed PW5 that he was in Limbang. PW5 pretended he could not meet him (caller). A few days later (19 April 2003), PW5 received a call. The caller, who said he was in Limbang, wanted to meet PW5. PW5 agreed to meet the caller at the Royal Park Hotel, Limbang. About 5–10 minutes later, the same caller telephoned PW5. PW5 requested the caller to come up to room 201. About 1–2 minutes later, the accused was outside room 201. Inside room 201, the accused quoted to PW5 the prices of the drugs. The accused left room 201 without a deal being struck.

[4] On 30 April 2003, the accused telephoned PW5 and said he was in Limbang. PW5 replied that he (PW5) would contact him (accused) when he (PW5) reached Limbang. Meantime, the police had secured rooms 108 and 109 at the Royal Park Hotel. In room 108, the accused related to PW5 the prices of the drugs. The accused agreed to sell the equivalent of 150g of methamphetamine to PW5, at the price of RM21,000. On 1 May 2003, the accused came to room 108 and talk again to PW5 about the sale of drugs. Later, the accused telephoned and reminded PW5 to be ready with the money. At 2.30am on 2 May 2003, the accused telephoned and instructed PW5 to be ready with RM22,000, it being RM21,000 for the drugs and RM1,000 for 'commission'. At about 2.20pm, the accused telephoned and said he (accused) wanted to see the money. PW5 asked the accused to come to room 108. At about 2.30pm, the accused was in room 108. PW5 showed RM10,000 to the accused. PW5 told the accused that the balance would be paid upon delivery of the drugs. The accused left room 108.

[5] The next day (3 May 2003), at about noon, the accused telephoned and instructed PW5 to standby with RM22,000. Assistant Superintendent of

Police Peter Ambuas (PW7) secured that cash and had it handed to PW5. A short while later, the accused telephoned and said to PW5 that he would come over to count the money. About 10–15 minutes later, the accused was in room 108. The accused asked about the money. PW5 handed a bag of money to the accused. The accused found only RM21,000. The accused then proposed, to which PW5 agreed, that the amount of drugs be reduced. The accused wanted to take the money. PW5 did not agree to that without the drugs. The accused nodded and left the room.

[6] At about 5.30pm, the accused was again in room 108. The accused said that the drugs were ready for delivery and he wanted the money. PW5 said he wanted the methamphetamine. The accused left room 108. Meantime, PW5 alerted PW7 who was in room 109 to be on standby. As arranged, PW5 loosened the connecting door between the two rooms. A signal in the Kedayan language was agreed between PW5 and PW7 to spring the trap. Shortly thereafter, the accused was in room 108. PW5 asked for the drugs. The accused took out a red bag from inside one of his stockings and handed it to PW5. PW5 opened that bag and found three(packets of a crystalline substance (later marked as exh P14(1–3)). PW5 returned that bag to the accused who placed it inside a drawer. PW5 handed the money to the accused who proceeded to count it. Meanwhile, on the pretext of calling his men to pick him up, PW5 telephoned PW7 and gave the signal — 'sent a boat, I want to go back' — to spring the trap. Thereupon, PW7 burst into room 108. PW7 identified himself. The accused moved towards the main door of room 108, but was restrained by PW5. The accused was arrested. The red bag (it was a red sunglasses bag/casing — see 297ART) of drugs was recovered from the said drawer. The trap money was recovered from the accused. PW7 read a caution to the accused. PW7 asked the accused as to where he kept the rest of the drugs (see p 197ART). The accused replied 'di bilik 504 Purnama Hotel'. PW7 reduced the question and answer into writing (P25). The police party then proceeded with the accused in tow to Room 504 Purnama Hotel, Limbang. The appellant was the sole occupier of room 504. The door of room 504 was opened with the assistance of the staff of Hotel Purnama. Inside room 504, the accused gestured to the ceiling of the bathroom, wherefrom the police recovered part of the drugs (P15(1–4)) stated in the second charge, and the cannabis (P16G) stated in the third charge. Under the mattress, the police uncovered the balance of the drugs (P17G) stated in the second charge. The genus and weight of the aforesaid drugs were as per the charges.

[7] In his statement from the dock, the appellant gave a matching account of his meetings/negotiations with PW5 and the events that transpired in rooms 108 and 504. But not all were in tandem. It was at variance in the following aspects (in the following summary, the words 'he' and 'him' denote the appellant, unless otherwise stated). He said to PW5 that he had no drugs but he

would source for it. His friend, one Ah Seng, also had no drugs. Ah Seng said he (Ah Seng) would buy a chemical called 'Tawas', and he could pass off that 'Tawas' as drugs to PW5. He agreed to that scheme to cheat PW5. At 3.30pm on 3 May 2003, Ah Seng said he (Ah Seng) had secured that 'Tawas'. Ah Seng spoke to PW5 on the telephone. He told Ah Seng that he would wait in room 108 for his (Ah Seng) call. At 4pm, Ah Seng telephoned and informed him that the Tawas was packed. He said to Ah Seng to send it to Royal Park Hotel. 20 minutes later, Ah Seng telephoned and said he was at the Royal Park Hotel. He went down to Ah Seng's car and inspected the 'Tawas'. He brought the 'Tawas' to room 108. He handed the 'Tawas' to PW5. He counted the money that PW5 handed to him. He wanted to leave but PW5 told him to wait. PW5 wanted to call his men to get ready a boat. Someone broke the connecting door. He was pushed to the floor and handcuffed. What he said was recorded. Photographs were taken. He was taken to Jian Lun Hotel. Then he was taken to the Purnama Hotel. The door of room 504 could not be opened. Something was stuck in the key hole. The staff of the hotel removed that something with pliers and then opened the door of room 504 with the spare key. PW5 asked where he had put 'the thing'. He said, on the ceiling. The police found 'the thing'. He was asked to witness the search of room 504. Under the bed, the police recovered a black plastic bag. He was asked to whom that black plastic bag belonged. He said he did not know.

[8] In short, it was the defence that 'Tawas' and not any dangerous drug that was sold to PW5. As for the possession charges, absolutely nothing was said by the appellant in his statement save for a denial of his knowledge of the presence of those drugs under the mattress.

[9] In line with the grounds of appeal, learned counsel (Voon Lee Shan) submitted, either in his oral and or written submission, as follows. The trial court erred in holding that PW2 was qualified as a government chemist to analyse the instant drugs. The academic and professional credentials of PW2 must be produced. 'The prosecution should lead evidence that PW2 had made special study of dangerous drugs … and possessed special skill in the detection and analysis of these dangerous drugs … but there was no such evidence' (see p 34 of the written submission of learned counsel). There was a doubt as to the correctness of the chemical analysis and the conclusion that the substances were in fact the dangerous drugs as stated. No reasons were given by PW2 for his conclusion. There was no evidence that the weighing instruments were calibrated. The weight would determine the penalty. The readings would be affected if the weighing instruments were not accurate. There was a break in the chain of custody when the drugs exhibits were not sealed on the spot. The police seal 'PDRM 400' was in the possession of PW7, and he could have abused its use (see p 51 of the written submission of learned counsel). Exhibits were taken out from the safe but there was no evidence that the safe was locked.

The colour and character of the drug exhibits when seized and when analysed were different. Without individual markings, the witnesses could not have identified the exhibits. Without photographs, there arose a doubt as to the location of the drugs when recovered. There was no evidence on the movement of the exhibits from its place of safe keeping to the court before they were tendered (see p 96 of the written submission of learned counsel). All said and done, the identity of the exhibits was in doubt. The trial court erred in holding that the appellant had exclusive possession and had knowledge of the nature of the drugs.

[10] Notwithstanding that it was not in the grounds of appeal, learned counsel nonetheless submitted, either in his oral and or written submission, as follows. The transaction was not completed, as the appellant was still counting the money. The opening address of the prosecution failed to comply with s 179(1) of the Criminal Procedure Code ('the Code'), as the learned DPP only informed that the prosecution would adduce both direct and circumstantial evidence to prove the charges. It was not indicated that the evidence of an agent provocateur would be adduced. As the caution was not immediately read to the appellant, the search list and drugs recovered in room 108 were not admissible (see p 67 of the submission of learned counsel). The caution was bad in law. The prosecution must prove that the appellant had exclusive possession of rooms 108 and 504 to tie him to the drugs. Fingerprints were not lifted from the drugs exhibits. PW10 entered the room to clean it. A colleague of PW10 cleaned the bath room. Therefore, the appellant had lost exclusive possession of room 504. Someone could have planted those drugs inside room 504. There was no trafficking within the definition of s 2 of the Dangerous Drugs Act 1952 ('the Act'). There was no possession at the time of arrest. There was no prima facie case for all charges.

[11] In his written submission, the learned DPP (Yaacub bin Hj Chik) touched mainly on the law. In his oral submission, the learned DPP pointed to p 334ART, where it was in evidence that the drug exhibits were locked, and to p 299ART, where it was in evidence that the chemist explained that the colour difference of the drugs was because from crystalline form it had turned to powder, which effectively answered those points raised by learned counsel. The learned DPP further submitted that the drug transaction was completed and that notice of the defence case of fake drugs was not raised at the stage of the prosecution case.

[12] One authority that the learned DPP cited was *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233, which was the prosecution's appeal against the acquittal and discharge of the respondents who were charged with trafficking in dangerous drugs under the Act. In holding that no prima facie case had been made out against the respondents at the close

of the case for the prosecution, the learned trial judge concluded, inter alia, that: (i) there was 'a patent break in the chain of evidence' in respect of the handling of the cannabis by the government chemist; (ii) another person (Amran) had access to or was in occupation of the room from which the cannabis was seized and, thus, the respondents could not be said to have exclusive custody and control of the cannabis; (iii) the prosecution's failure to call Amran or to offer him to the defence would 'automatically trigger off the invocation of adverse inferences under s 114(g) of the Evidence Act 1950'; and (iv) the police informer ('Cholar') was actually an active agent provocateur and, thus, the prosecution's failure to call Cholar or to offer him to the defence would attract adverse inferences.

[13] In allowing the appeal, the Federal Court per Choong Siew Fai CJ (Sabah and Sarawak) (delivering the judgment of the court) held: (i) that in the absence of any cross-examination by the defence on the safe keeping of the cannabis (or of any suggestion that other chemists might have meddled with the cannabis), the concern of the trial judge, that the cannabis exhibited in court might not be that which was seized from the house in which the respondents lived, was misplaced, and that given that where there was no doubt that the cannabis that was seized and handed to the government chemist and the investigating officer was that which was produced in court, it was not essential for the government chemist to show how she kept the cannabis before returning it to the investigating officer; (ii) that the definition of 'trafficking' in s 2 of the DDA is wide and includes buying and selling; (iii) that where there is evidence indicating the identities of the alleged offenders and the sale transaction, fingerprint evidence assumes little value or significance; and (iv) that the drawing of adverse inferences is not a matter of an inflexible rule but depends on the circumstances of each particular case.

[14] In the present case, there was direct evidence on the identity of the alleged offender and any want of fingerprint evidence was of no consequence. Of consequence however was the absence of cross-examination by the defence on the markings of the drug exhibits. It is settled that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony (*Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 at p 213, per Raja Azlan Shah CJ, as HRH then was) or 'tantamount to accepting the truth of the witness's testimony' (*Public Prosecutor v Mohd Amin bin Mohd Razali & Ors* [2002] 5 MLJ 406; [2002] 5 CLJ 281 per Zulkefli J, as he then was). That rule requiring a party's case to be expressly put to his opponent's material witnesses when they are under cross-examination applies to both criminal and civil trials (*Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639). It is not necessary to put the same question to all witnesses (*Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19).

A But where the opportunity to challenge the opponent's evidence is totally eschewed, then it must follow that unchallenged evidence cannot be disputed at all (*Browne v Dunn* (1893) 6 R 67).

B **[15]** No issue could be raised that the drug exhibits were not properly marked. But since it was raised, then it would have to be said that the submission on the custody/markings of the drug exhibits, and the possible mix up of those drug exhibits, ran counter to the evidence. PW7 had marked those three packets of drugs recovered from room 108 before he proceeded to room 504 (see p 208ART). Before he proceeded to room 504, PW7 had put those C three packets of drugs back into the red bag (see p 300ART). That was witnessed by PW5 (see p 236ART). PW7 then deposited that red bag and contents into his sling bag. In the case of the drugs recovered from above the ceiling, PW7 had marked and then wrapped them with a shower cap (see p 311ART). And in the case of the drugs recovered from under the mattress, the D evidence was that PW7 had marked them (see p 312ART). All bags and contents ended up in PW7's sling bag. But yet there could not have been a mix up of the exhibits. The red bag that contained them distinguished the packets of drugs recovered from room 108. The shower cap that wrapped them distinguished the packets of drugs recovered from the ceiling. The rest of the E drugs would have been those recovered from under the mattress. PW7's identification (see p 298ART) of the exhibits as the drugs recovered from room 108 and from room 504 was never challenged (see cross-examination of PW7 at pp 344–376ART). Since the identity of the drugs recovered from room 108 and from room 504 was not in dispute, the chain of custody was of no F importance. It was too late, at the stage of appeal, to dispute the identity of the exhibits, and or to contend that the witnesses could not identify, by reason of the absence of their individual markings, those exhibits.

G **[16]** For the same reason that it was not challenged during the trial, the findings of the government chemist could not also be disputed. Given that those findings were not challenged, it was, with respect, pedantic to argue that the government chemist had not given reasons for his findings and or that the government chemist was not competent to conduct the analysis. Indeed, the submission on the non production of the baccalaureate of the government H chemist was totally misplaced, for all that was 'really required for the prosecution to show for the admission of the chemist's evidence on the identity of the drug was merely to adduce evidence as to his qualification in the field of chemistry and that he was a chemist in the employment of any government in the Federation and had examined or analysed the drugs' (*Khoo Hi Chiang v* I *Public Prosecutor and another appeal* [1994] 1 MLJ 265 per Abdul Hamid Omar LP) (see *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217,

where it was held by the former Supreme Court per Jemuri Serjan (Borneo) CJ that a trial judge is entitled to 'accept the position of a government chemist as sufficient, without going into his academic qualification or experience', which imposed a lesser evidential burden on the prosecution).

[17] In any case, there were reasons for the findings by PW2 who gave an account of what he did (see pp 45–63AR), although there was no necessity for him to support his findings with the details of his analysis (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, where it was held by the former Supreme Court per Mohamed Azmi FCJ (delivering the judgment of the court) that 'where the opinion of the chemist is confined only to the elementary nature and identity of the substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step'; incidentally, *Munusamy* was recently followed, again, by the Federal Court in *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201). Also, there was evidence that the weighing balance was calibrated (see pp 71–72ART).

[18] There was also no merit in the argument on s 179 of the CPC, or on the caution. Section 179 of the CPC states that 'an officer conducting the prosecution shall open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused'. But 'the opening statement is not (any) evidence. It is thus not a requirement that this statement shall contain elaborate details. The omission of the mention of any part of the prosecution evidence in its opening statement, to us, is inconsequential and not destructive to the prosecution case. Nor is the prosecution prevented, later, from adducing any evidence not earlier mentioned in its opening statement' (*Timhar Jimdani Ong & Anor v Public Prosecutor* [2010] 1 MLJ 775 per Abdull Hamid Embong JCA, as he then was, delivering the judgment of the court). In the case of the caution, any defect in the caution affected not the admissibility of the information evidence, as s 27 of the Evidence Act 1950 stands alone, quite independently of s 37A of the Act and s 113 of the CPC. '... for s 27 to apply, the information must be such as has caused discovery of a fact. In other words, the fact must be the consequence and the information the cause of its discovery. Moreover the information must relate distinctly to the fact discovered' (*Wai Chan Leong v Public Prosecutor* [1989] 3 MLJ 356 at p 358, per Gunn Chit Tuan SCJ, as he then was, delivering the judgment of the court). In the present case, there was no doubt that the fact discovered (drugs on the ceiling) was the consequence of the information received. The information received was clearly admissible, but without the confessional content (see *Mustakim bin Chek Man v Public*

Prosecutor [2010] 2 MLJ 760, on the admission of information evidence under s 27 of the Evidence Act 1950).

[19] The submission 'no prima facie case' failed also to make inroad. In relation to the trafficking charge, the weight of the dangerous drugs involved was not a determinative factor (*Leong Siew Hoong v Public Prosecutor* [1988] 1 MLJ 396). Section 2 of the Dangerous Drugs Act 1952 (the Act) defines trafficking as to include the act of selling any dangerous drug. And the act of selling is '... complete upon transfer of the property in the goods even though the price has not been paid' (*Public Prosecutor v Sa'ari bin Jusoh* [2007] 2 MLJ 409 per Augustine Paul FCJ), is 'delivery for money … even though the money … has not passed …' (*Public Prosecutor v Sa'ari bin Jusoh* per Abdul Aziz Mohamad FCJ). It was the unchallenged evidence of PW5 that the appellant sold that quantity of methamphetamine found in room 108 to him (PW5). And that evidence of PW5, which was specifically allowed for admission by s 40A of the Act, was direct evidence of the act of the appellant (see *Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* [2010] 4 MLJ 141, para 30, per Abdull Hamid Embong FCJ). But the incriminating evidence was more than just the word of PW5. The recovery of the drugs from the said drawer in room 108 substantiated the fact of the act. The evidence of the various meetings and negotiations fortified the fact that the act of the appellant was as charged. Given all that, it was all so evident that the act of trafficking was unmistakably made out, by direct evidence. It was an open and shut case.

[20] In relation to the two charges of possession, the evidence was that part of the drugs stated in the second charge was discovered, above the ceiling of the bathroom of room 504, in consequence of the information received from the appellant. The further evidence was that the appellant was the sole occupier of room 504. The evidence of PW9 and PW10 (employees of Purnama Hotel) made out, and the guest registration card (P33) substantiated them, that the appellant was the sole occupier of room 504. As sole occupier, the appellant would have had exclusive possession of room 504. With exclusive possession, it should follow that all proscribed drugs found in room 504 should belong to the sole occupier. The proscribed drugs stated in the second charge were found concealed in some obscure corner above the ceiling and under the mattress. Section 37(g) of the Act provides that 'if any dangerous drug is found to be concealed in any premises, it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises'. The information evidence evinced that the appellant had actual knowledge of the presence of drugs in room 504 that he solely occupied. Section 37(g) of the Act presumed that the appellant had knowledge that drugs

were so concealed in the room that he solely occupied. But knowledge alone is not enough to prove possession. There was no evidence that the appellant was in actual physical possession or in actual physical custody or control of those drugs. Yet it could still be deduced that the appellant must have had custody or control of it on account of the following factors. The appellant was the sole occupier of room 504. Hence, the appellant had exclusive possession of room 504. The drugs were concealed. It would be different had those drugs not been concealed, in which case it could be said that anyone with access to room 504, such as a hotel guest or a member of the hotel staff, could have left it there. But given that the drugs were concealed and that the accused knew they were so concealed, then only the appellant and not any hotel guest or a member of the hotel staff, could have so concealed those drugs. Had any hotel guest or member of the hotel staff so concealed those drugs without the knowledge of the appellant, then it could not have been possible for the appellant to have known that drugs were so concealed. There was no direct evidence, but on the facts, it should be that only the appellant could have concealed those drugs. To conceal those drugs, the appellant had to have custody or control of it. Either way, with custody or control, s 37(d) of the Act presumed that the appellant had possession of those drugs in room 504 and had, until the contrary was proved, knowledge of the nature of those drugs. All ingredients of the offence of possession were present and proved.

[21] In as much as there was no defence, there was also no doubt on guilt. The fact of the matter was that it was methamphetamine that was recovered in room 108 in the presence of the appellant. There was absolutely no possibility that the appellant could have sold 'Tawas' to PW5. And need it be said, that the bare denial by the appellant of knowledge of the drugs in room 504 was no defence. Conviction was the correct verdict.

[22] The imposition of a fine for the third charge was strange. The death sentence was imposed for the first charge. A sentence must be imposed for the third charge. But given that the maximum penalty was exacted, to further impose a fine, even though for a separate offence, came across as rather harsh and unkind. Instead of a fine, it should have been a custodial sentence, to run concurrently with the custodial sentence for the second charge, as both possession offences were committed at the same time and place and in the one and same transaction. However, that fine was left undisturbed, as the appeal against sentence was not taken up in argument.

A **[23]** For these reasons, we unanimously dismissed the appeal and affirm the convictions and sentences of the trial judge.

Appeal dismissed.

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Reported by Kohila Nesan

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